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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 727

FRANK E. EALEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petition of Frank E. Ealey for a Writ of Certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit made and entered by said Court on August 15, 1967, a copy of which is attached hereto as Appendix I.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED.

The date of the judgment of the Court of Appeals sought to be reviewed is August 15, 1967.

Rehearing was denied on September 15, 1967.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented:

(1) Whether the Trial Court committed prejudicial error by reserving its ruling on Counts III and IV of the indictment, submitting said counts to the jury along with other counts after a motion for judgment of acquittal is made at the close of the Government's case.

(2) Whether the evidence was insufficient as a matter of law to submit Counts V and VI to the jury after a motion for acquittal was made.

(3) Whether the trial court's ruling granting defendant's motion of acquittal on Counts III and IV foreclosed conviction on Counts I and II under the facts in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) United States Constitution, Amendment V, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(2) Rule 29, Federal Rules of Criminal Procedure provides:

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a

motion for a new trial. If a verdict of guilty is returned the Court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the Court may order a new trial or enter judgment of acquittal.

STATEMENT OF THE CASE

Defendant was charged in a six count indictment, two counts each of violation of 21 *U.S.C.* 174, 26 *U.S.C.* 4704(a) and 26 *U.S.C.* 4705(a), on or about July 27, 1966; was duly arraigned on or about August 17, 1966 and entered pleas of not guilty to each count. Trial by jury was set for September 6, 1966 and commenced on that date. A verdict of guilty was returned by the jury on each count of the indictment on September 6, 1966, and on October 28, 1966, judgment and sentence was pronounced and imposed on Counts I, II, V and VI. The Court set aside the verdicts of guilty on Counts III and IV of the indictment and dismissed said counts pursuant to defense counsel's motion made at the close of the Government's case (R.T. pp. 104-8) and on which ruling had been reserved. Defendant appealed from the judgment and sentence rendered.

SUMMARY OF FACTS

In a six count indictment defendant was charged as follows:

(1) Two counts of violation of 21 *U.S.C.* 174, Count I charging that on or about December 16, 1965,

at Seattle, Washington, defendant knowingly and unlawfully concealed and sold a quantity of narcotic drugs, heroin hydrochloride, knowing the same to have been imported into the United States contrary to law. An identical charge to Count I is made in Count II except that the alleged offense occurred on or about January 13, 1966. (2) Two counts of violation of 26 *U.S.C.* 4704(a); Count III charging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully sold, disbursed and distributed, a quantity of heroin hydrochloride, a narcotic drug not in or from the original stamped package. An identical charge is made in Count IV except that the alleged offense occurred on or about January 13, 1966. (3) Two counts of violation of 26 *U.S.C.* 4705(a), Count V alleging that on or about December 16, 1965, at Seattle, Washington, defendant knowingly and unlawfully sold a quantity of heroin hydrochloride, a narcotic drug, not in pursuance to a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate. Count VI charges an identical offense except that it allegedly occurred on or about January 13, 1966.

At the trial the Government called one Joseph Vincent Ferro, a narcotic agent, who testified that his office investigated defendant in October, 1965, on the basis of information received from the Bureau's Los Angeles office. R.T. 7. Joseph Gordon, a deputy sheriff, was engaged and used as an undercover agent

to investigate defendant and on December 16, 1965, Gordon was given $500 of official advance funds (money used to purchase narcotics) R.T. 8, and told to go to the residence of an informant, Harvey Edwards, for the purpose of purchasing narcotics from defendant. The residence in question was placed under surveillance by Ferro and others assisting him. Defendan was later observed leaving the residence in question with Deputy Gordon and the latter had a container, containing a white substance later admitted into evidence as People's Exhibit 1, R.T. 13.

On January 13, 1966, Ferro testified that he gave Gordon $1,100 to purchase narcotics from defendant. R.T. 21. The narcotics allegedly purchased were admitted into evidence as People's Exhibit 2.

Agent Ferro testified, over objection, that the narcotics allegedly purchased on December 16, 1965 did not bear a tax stamp. R.T. 14. He further testified that he does not issue order blanks of the Secretary of Treasury for purchase of narcotics; he is not assigned to that department nor is it one of his duties. R.T. 18-20. He also testified that the container wherein the narcotics allegedly purchased on January 13, 1966 had no tax paid stamp affixed to it. R.T. 25. He is not familiar with the type of stamp placed on "these packages." R.T. 27. The jury was then admonished to disregard all of the testimony that no tax stamp appeared on the Government's Exhibits 1 and 2.

Joseph Gordon, deputy sheriff, Kings County, who was loaned to Federal Bureau of Narcotics, testified

that he first met defendant at 3646 Courtland Place South where a person by the name of "Harv" resided. He was not in uniform nor did he reveal who he was to defendant at this meeting or any other. R.T. 31-32. On December 16, 1965, he purchased narcotics from defendant.

Gordon testified that on January 6, 1966, he placed a person to person call to defendant in Sacramento, California, R.T. 42, with Ferro and Agents McClain and Abbey listening on extension phones. He did not, however, recognize defendant's voice. After a voice came on the phone, Gordon stated "Hello Frank" and after conversation by the party on the other end, he stated "I need three and at least two." Use of such jargon means ounces of heroin. R.T. 45. No other testimony was given regarding this telephone conversation.

On January 13, 1966, the Bureau gave Gordon $1,100 of advance government funds with which to purchase narcotics. Gordon is not registered with anyone to purchase narcotics except in his official position. Nor did he have any authority from Secretary of the Treasury either time the alleged purchases took place. R.T. 57. On this particular day a sale of heroin was consummated with defendant by Gordon.

Aubrey Abbey, Agent Federal Bureau of Investigation, corroborated the testimony of Ferro and Gordon. R.T. 74-93. William J. Gowans, chemist employed by the United States Treasury Department, testified that the powdered substance in Exhibits 1 and 2, in his opinion after conducting certain tests, was heroin hydrochloride.

After the Government rested defendant moved the Court out of the presence of the jury for a directed verdict of acquittal. R.T. 104. The Court denied all motions for mistrial and denied the motion for judgment of acquittal on Counts I, II, V and VI of the indictment. The Court reserved ruling on Counts III and IV until after the jury's verdict was returned finding defendant guilty on each count as charged.

ARGUMENT

I. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY RESERVING ITS RULING ON COUNTS III AND IV OF THE INDICTMENT, SUBMITTING THE COUNTS TO THE JURY ALONG WITH OTHER COUNTS AFTER A MOTION FOR JUDGMENT OF ACQUITTAL IS MADE AT THE CLOSE OF THE GOVERNMENT'S CASE.

It should be made clear at the outset that no challenge here is intimated or remotely suggested or intended regarding the court's setting aside the guilty verdicts of Counts III and IV of the indictment and acquitting defendant on these counts. What is challenged here is the procedure the trial court followed in doing so. It is defendant's contention, then, that it was prejudicial error for the court to first submit the two counts to the jury after a motion was timely and duly made to direct acquittal or dismiss and rule on the motion after verdicts of guilty had been reached.

Following such a course in the factual circumstances of this case, we believe, manifestly resulted in reversible error. It should be kept in mind that all

six alleged offenses occurred on two different dates. In fact the two quantities of alleged contraband drug were the basis for the three different charges on the two different occasions. Hence, in the minds of a lay jury a finding of one violation would automatically require a finding of guilt on all charges based on the same alleged incidents. Much like the situation in *Chichos v. Divideria,* 87 S. Ct. 271 (1966) by parading six counts of alleged illegal conduct before the jury, such a procedure "gave the prosecution an advantage of offering the jury a choice—a situation apt to induce a doubtful jury to find the defendant guilty * * *." *U.S. ex rel. Hetenyi v. Wilkens,* 384 F. 2d 844, C.A. 2d (1965), cert den. *Mancusi v. Hetenyi,* 383 U.S. 913.

Rule 29, FRCP, provides:

> (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve

> decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the Court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the Court may order a new trial or enter judgment of acquittal.

Rule 29 is worded in the context of a motion of acquittal being made to the entire charge or indictment. It is not framed in such a way as to challenge, in part, selected counts. Hence, in such cases, by lumping those charges upon which evidence has been admitted but which as a matter of law is not sufficient to sustain conviction, a defendant is placed in the unwary predicament of having a doubtful jury convict him on a wholesale basis of all of the charges submitted to it. And that is exactly what occurred here. See *Federal Practice and Procedure,* Sections 2221-2225.

To be sure there was not one single scintilla of evidence presented that defendant knowingly sold or disbursed a quantity of narcotics "not in or from the original package." The *corpus delicti* of the offenses charged in Counts III and IV was not established as a matter of law and no offenses shown. See

Epstein v. U.S., 174 F. 2d 754, 6th Cir. (1949). Defendant, being his only witness, denied all allegations of all counts. Thus, the record remained as it was at the close of the Government's case regarding these charges. It, therefore, was incumbent upon the trial judge to grant the motion before submitting the case to the jury. Having failed to do so and in the circumstances of each of the four remaining charges on which convictions were rendered, after the close of the case and discharge of the jury, defendant should have been granted a new trial in order to avoid the prejudicial effect of having two charges legally deficient considered along with other charges.

It is aptly stated on *Moore's Federal Practice*, Vol. 8, pp. 29:4-29:5:

> "If the evidence is insufficient to sustain a conviction, why not submit the case to the jury and allow it to reach that conclusion? The answer, of course, is that a defendant is entitled to protection against an improper or irrational verdict of the jury. In other words, Rule 29 takes cognizance of the reality that jurors may not always be capable of applying strictly the instructions of the court, nor of basing their verdict entirely upon the evidence developed at the trial."

Thus, the very protection the rule affords is lost by the practice of trial judges who reserve ruling thereon until after a jury has returned its verdict. And we contend such a practice violates an accused's right to a fair and impartial trial. See comment, 70 Yale L.J. p. 1151, *The Motion for Acquittal: a Neglected Safeguard.*

II. WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUBMIT COUNTS V AND VI TO THE JURY AFTER A MOTION FOR ACQUITTAL WAS MADE.

On reading the indictment in this case one must conclude that the Government either overzealously fractionalized its case into legally defective counts in order to achieve a desired result or overestimated the evidence it had to establish a case. The record is devoid of any evidence tending to establish directly, circumstantially or by inference that on either December 16, 1965 or January 13, 1966, defendant knowingly or unlawfully sold a quantity of heroin hydrochloride "not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate."

Agent Ferro and Deputy Gordon testified at length regarding the use of advance funds with which to purchase evidence but such testimony, it is submitted, does not raise the inference that the requisite form was not obtained also or represented to defendant to have been obtained. Source of the funds used to purchase contraband is no element of the offense but the absence or presence of the requisite form is indeed. While it is true as Deputy Gordon testified, in the context of the question raised that he did not "have any sort of written form from the Secretary of the Treasury, the type of form which authorizes the purchase of narcotics * * *" at the time of an alleged purchase (R.T. pp. 56-58) such questions and answers do not settle the matter because the statute specifically provides that a delegate of the secretary may issue the

requisite form. In addition, from the Government's entire case, we had at least three other persons assisting in the events: Ferro, Abbey and McClain. There is no testimony that neither of those persons had no form or that Gordon was not acting, at the time of the alleged purchases, for each or any of them. In addition, as the record shows, Ferro was unfamiliar with the forms required and there was no showing that Gordon knew any more about what was required or had in fact been obtained. In the circumstances, it is submitted these counts should not have been submitted to the jury on such shallow evidence and absence of proof of an element of the charged offenses.

This factor together with the court's submission of Counts III and IV to the jury resulted in a prejudicial error and a deprivation of due process of law as guaranteed by Amendment V to the United States Constitution.

III. WHETHER THE TRIAL COURT'S RULING GRANTING DEFENDANT'S MOTION OF ACQUITTAL ON COUNTS III AND IV FORECLOSED CONVICTION ON COUNTS I AND II UNDER THE FACTS IN THIS CASE.

21 *U.S.C.* Section 174 and 26 *U.S.C.* 4704(a) contain what Chief Judge Bazelon has termed "statutory overlap." See concurring opinion, *Hutcherson v. U.S.*, 345 F. 2d 964, D. C. Cir. (1965). A reading of both sections indicates that 26 *U.S.C.* 4704(a) is more specific in its reach than 21 *U.S.C.* 174. Thus where a defendant is acquitted of charges of knowingly selling contraband not from its original package or without the appropriate stamps affixed, a Section 174 charge

under Title 21, based on the same conduct must necessarily fall. This is so because narcotics possessed in the original package properly stamped would raise no presumption of illegal entry or importation into the United States and would not place upon a defendant any necessity to explain his possession. Thus, where a prosecutor has elected as he might to charge a defendant with counts of violation of both 21 *U.S.C.* 174 and 26 *U.S.C.* 4704(a) based on the same conduct acquittal on the latter charge necessarily compels acquittal on the former.

We raise no questions here that the United States Attorney could not bring the charges as he did. What is contended here is that, having elected to prosecute in this way, he is bound by the result which obtains. It defies logic to say on the one hand a defendant is legally innocent of the charge and, using the same conduct, in the same court and case, convict him on another charge covering the same essential elements.

Dated, Sacramento, California,
October 11, 1967

Respectfully submitted,
COLLEY AND MCGHEE,
O. W. GOAKEY,
By MILTON L. MCGHEE,
Attorneys for Petitioner.

(Appendix Follows)

Appendix I

United States Court of Appeals
For the Ninth Circuit

No. 21,520

FRANK E. EALEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellees.

ORDER AFFIRMING JUDGMENT

On Appeal from the United States District Court
for the Western District of Washington

Before: Chambers, Johnsen and Koelsch,
Circuit Judges.

Per curiam:

The court finds no reversible error in the record. The judgment of conviction is affirmed.

Richard H. Chambers,
Harvey M. Johnsen,
M. Oliver Koelsch,
United States Circuit Judges.

Filed, August 15, 1967,
Wm. B. Luck, Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 727

FRANK E. EALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A six count indictment, based on two transactions in heroin on December 16, 1965, and January 13, 1966, was returned against petitioner in the United States District Court for the Western District of Washington. Counts 1 and 2 charged concealing and selling illegally imported heroin, in violation of 21 U.S.C. 174; counts 3 and 4 selling heroin from an unstamped container, in violation of 26 U.S.C. 4704(a); and counts 5 and 6 dispensing narcotics without a written order form, in violation of 26 U.S.C. 4705(a) (I R. 1–3).

A deputy sheriff named Gordon, hired as an undercover agent, made the purchases with government funds. On December 16, 1965, he paid petitioner $350

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for narcotics which, in accordance with petitioner's directions, he found in a tree outside the motel where they met. The narcotics were in a rubber prophylactic which was turned over to narcotic agents (II R. 9–11, 34–40, 96). On January 6, 1966, petitioner measured out 66.9 grams of heroin and placed them in a container which he handed to Gordon in exchange for $1,050 (II R. 48–51, 198). The narcotics were later given to Agent Ferro (II R. 25, 52–53).

Sheriff Gordon testified further that on neither occasion was he registered with anyone to purchase narcotics; nor did he present to petitioner any written request for the heroin on a form supplied by the Treasury Department (II R. 56–58). Agent Ferro testified that there were no tax stamps on either container containing the narcotics (II R. 14, 25). After the trial court ascertained that the agent was not familiar with the type of Treasury tax stamp customarily affixed to narcotics, the agent's testimony concerning the absence of such tax stamps on the two containers was ordered stricken (II R. 25–27).

At the close of the government's evidence, petitioner moved for a judgment of acquittal on all six counts. The court expressed doubts as to the sufficiency of the evidence on the stamped package counts (3 and 4) but reserved decision until after verdict. (II R. 104–107). At the close of petitioner's case, the motion was not renewed, although after the jury had retired petitioner did object to the submission of counts 3 and 4 to the jury (II R. 143–144). A verdict of guilty was returned against petitioner on all six counts. The trial court, at

the time of sentencing, directed a judgment of acquittal on counts 3 and 4 (I R. 44–45, 54).

Petitioner was sentenced to ten years' imprisonment on counts 1 and 2 and to five years on counts 5 and 6, all sentences to run concurrently. The court of appeals affirmed *per curiam* (Pet. App. I).

1. The ultimate acquittal on counts 3 and 4 did not require an acquittal on the other counts. Although the offenses are closely related and arise out of the same two transactions, the offenses constitute three separate violations of three statutes, each containing different elements and requiring different proofs. See *Harris* v. *United States,* 359 U.S. 19, 23–24; *Gore* v. *United States,* 357 U.S. 386. The acquittal on counts 3 and 4 was based on the judge's view that there was insufficient proof of the lack of stamps on the package. That in no way affected the proof on the other counts.

2. Petitioner was not prejudiced by the judge's reservation of decision on counts 3 and 4 until after verdict. The procedure is specifically authorized by Rule 29(b). The rule does not preclude the court, any more than the jury, from treating each count of the indictment separately. Petitioner's assertion that the offenses involved are so indistinguishable as to require the jury to find him either guilty or innocent on all three is, for the reasons stated above, without merit. In its charge to the jury, the trial court set forth the necessary elements to be proved as to each offense and the distinct presumptions on which the jury could rely in their deliberations (II R. 129–134). That the judge

disagreed with the jury as to the proof of the absence of stamps does not show that the jury was confused.

3. Under 26 U.S.C. 4705(a), it is an offense to sell narcotics except pursuant to a written order on a blank supplied by the Secretary of Treasury or his delegate. There is no merit in petitioner's challenge to the sufficiency of the evidence on counts 5 and 6 laid under that statute. Gordon testified to the purchases from petitioner; that at no time did he deliver to petitioner a written form from the Treasury Department; and that he was not registered with anyone to purchase narcotics (II R. 56–58). All elements were proved.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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Attorney.

NOVEMBER 1967.

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